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No. ....., Original

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Action in Original Jurisdiction

Motion for Leave to File a Complaint With Attached Complaint

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Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Motion for Leave to File a Complaint

The State of California, by George Deukmejian, its Attorney General, respectfully requests leave of this Court to file its complaint against the State of West Virginia, submitted herewith. The State of California seeks to bring this suit under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a)(1).

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United States Supreme Court

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STATE OF CALIFORNIA,
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v.

STATE OF WEST VIRGINIA,
Defendant.

Complaint for Damages

COMPLAINT

The State of California, by George Deukmejian, its Attorney General, brings this suit for damages on behalf of its subdivision, California State University and Colleges, San Jose State University against the State of West Virginia and its subdivision, the Regents of the University of West Virginia, and for its cause of action alleges as follows:

ACTION AND JURISDICTION

I.

1. This is an action for damages for breach of contract by the State of California against the State of West Virginia.

II.

2. This Court has original and exclusive jurisdiction of this controversy pursuant to Article III, Section 2, Clause 2 of the United States Constitution, and pursuant to 28 U.S.C. § 1251(a)(1).

PARTIES

3. The State of California is a sovereign state of the United States of America. The California State University and Colleges system is a creature of the California legislature, dedicated to the higher education of its citizens. It is governed by a Board of Trustees. San Jose State University constitutes one of the numerous campuses which carry out the functions of the agency.

4. The State of the West Virginia is a sovereign state of the United States of America. West Virginia University is a creature of the West Virginia legislature, dedicated to the higher education of its citizens. It is governed by a Board of Regents.

NATURE OF THE CONTROVERSY

5. On or about February 21, 1974, a contract was executed by the appropriate authorities of San Jose State University and West Virginia University.

6. Among the terms of the contract was an agreement that the two schools engage in two intersectional, intercollegiate football games, the first of which was to be played

at San Jose, California, on October 31, 1981; and the second of which was to be played at Morgantown, West Virginia, on October 30, 1982.

7. In late December, 1980, an authorized agent and official of West Virginia University communicated to a San Jose State University agent and official that, notwithstanding the existence of the written contract, West Virginia University would not engage in the scheduled football contests.

8. San Jose State University authorities thereafter attempted to persuade West Virginia to reconsider its decision by promising to make the contract more attractive to the latter by such considerations as increasing the minimum guarantee at the San Jose game site; absorbing the housing costs for West Virginia's team personnel for the California game; and, further, offering to accept a lower percentage of gate receipts at the West Virginia game site.

9. Notwithstanding these further inducements, West Virginia declined to change its position.

10. Prior to receiving the decision from West Virginia in December 1980 that it would not play the football games San Jose State University had printed and mailed promotional materials for season ticket sales, including brochures and other announcements, and which indicated to the prospective buyers that West Virginia University would be one of five home game opponents, and was scheduled for October 31, 1981.

11. As a result of the late cancellation of the contest by defendant West Virginia, San Jose State University has incurred considerable costs. By way of specification, but not by way of limitation, costs have been incurred by having

to attempt to obtain substitute opponents, rearrange playing dates and of having to cancel a previously scheduled intercollegiate basketball game because it now conflicts with a substitute football game which has been obtained for a different date.

12. In addition San Jose State University will have to absorb increased costs in order to play the substitute game it has obtained for November 28, 1981.

13. Other additional costs and loss of revenue will occur, but which cannot be presently ascertained, by such things as loss of good will, lack of an opponent at this time for the vacant 1982 date, and loss of the share of gate receipts anticipated for the cancelled Morgantown game site.

14. At all times mentioned herein, San Jose State University has been willing to perform its obligations under the aforementioned contract.

15. San Jose State University is informed and believes that West Virginia University has scheduled football contests with other opponents for the dates October 31, 1981 and October 30, 1982.

16. San Jose State University through the California Attorney General's Office, has made a demand for just compensation on the Attorney General's Office of West Virginia, legal counsel for West Virginia University and which represents the University in this dispute.

17. As of the date of this writing, no reply has been received in response to the demand for compensation for breach of the contract.

18. For all of the above reasons, there exists a justiciable case and controversy between the State of California and the State of West Virginia.

PRAYER

WHEREFORE, the State of California prays for relief as follows:

(1) For an order granting the State of California leave to file its Complaint for Damages herein;

(2) For an award of general damages in the amount of One-hundred twenty-five thousand dollars ($125,000.00);

(3) For an award of punitive damages in the amount of One-hundred thousand dollars ($100,000.00);

(4) For plaintiff's costs of suit incurred herein; and,

(5) For such other relief as may be proper.

DATED: July 17, 1981

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California

RICHARD MARTLAND
Assistant Attorney General

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No. ....., Original

Supreme Court of The United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WEST VIRGINIA,
Defendant.

Brief in Support of (1) Motion for Leave to File Complaint (2) Complaint for Damages

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Attorney General of the
State of California

RICHARD MARTLAND
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I.

QUESTIONS PRESENTED

(1) Should the Court grant California leave to file its complaint under the Court's original jurisdiction?

II.

PARTIES

The plaintiff is the State of California, and the defendant is the State of West Virginia.

III.

JURISDICTION

This Court has original and exclusive jurisdiction of the case under Article III, Section 2, Clause 2 of the United States Constitution, and under 28 U.S.C. § 1251(a)(1).

IV.

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of California brings this action on behalf of one of its State agencies, the Board of Trustees of the California State University and Colleges, and one of its campuses, San Jose State University, to seek redress for breach of contract against the State of West Virginia and one of its State agencies, the Regents of West Virginia University.

This action finds its genesis in a contract negotiated between authorized agents of San Jose State University and West Virginia University on February 21, 1974, wherein the two schools agreed to play two intercollegiate football

games, at the respective home fields of each, on October 31, 1981 and October 30, 1982. The contract contained various other clauses, covering such particulars as split of gate proceeds, etc.

Just prior to Christmas of 1980 the Athletic Director of San Jose State University received a telephone communication from the Athletic Director of West Virginia University. The purpose of the call was to inform San Jose State University that West Virginia University would not be playing at San Jose in the fall of 1981, and that the contract would not be honored. The San Jose State representative protested strenuously, pointing out that it was too late to sever the contract, but to no avail.

Thereafter, in January 1981, at a convention in Miami, Florida, the San Jose State Athletic Director met with his counterpart from West Virginia University, and offered to increase the minimum guarantee for playing at San Jose by another $10,000; and also to provide housing for the West Virginia personnel at no cost when the team came to play in California. Also, an offer was made to accept a lower percentage of the gate for the game to be played at Morgantown. Again the response of West Virginia was that it was not interested, and that it had already replaced the two scheduled San Jose State games on its schedule with other schools.

Thereafter additional efforts were made by other parties, including staff counsel of the State University System in California to persuade West Virginia to honor its contract, but without success.

Prior to receiving the announcement from West Virginia that the football games would not be played San Jose State had printed and distributed announcements and brochures of its 1981 football schedule as part of its Christmas season

ticket sales promotion, and had of course, included West Virginia University as one of its home game opponents.

The California University authorities then asked for the assistance of the California Attorney General, who is, by law, required to represent the agency in all of its litigation. (California Government Code section 12511, *et seq.*.) Various communications were initiated by the California Attorney General's office to the office of the Attorney General of West Virginia to explore the possibility of resolving the problem without recourse to the courts. It was not possible to arrive at a solution, and recourse to litigation appears to be the only method by which San Jose State University can obtain adequate damages to compensate it for the breach of contract.

V.

THE NEED FOR INVOKING THE ORIGINAL JURISDICTION OF THIS COURT

This case involves a critical question, and needs resolution to remove a threat to the area of harmonious relationships between the States. Shall the States honor their contracts with one another, or be free to breach them if they subsequently determine that, from the interests of a particular State, it has not made a "good" contract, so unilateral breach is the solution? It is submitted that the delicacy of this problem, and problems just like it, are the reasons Article III, Section 2, Clause 2 of the United States Constitution was incorporated into the original Constitution.

It is further contended that both University systems involved herein are agencies of their respective states, and the substance of San Jose State University's claim is indeed a State of California claim, made against the substantive interest of the State of West Virginia.

The California State University and Colleges system, of which San Jose State University is a part is an agency of the State of California in the educational field; in other words, a branch or department of the State of California. In the case of *Arkansas v. Texas* (1953) 346 U.S. 368, [98 L.Ed.2d 80], the issue of whether a state university was the equivalent of a state was considered, and affirmed. In arriving at its determination, the Court noted several factors, at page 370:

> "The University, which was created by the Arkansas legislature, is governed by a Board of Trustees appointed by the Governor with the consent of the Senate. The Board, to be sure, is a 'body politic and corporate' with power to issue bonds which do not pledge the credit of the State. But the Board must report all of its expenditures to the legislature, and the State owns all property used by the University. The Board of Trustees is denominated a 'public agency' of the State, the University is referred to as 'an instrument of the state' in the performance of a governmental work, and a suit against the University is a suit against the State." 346 U.S. at 370.

Examining first West Virginia University, it is noted that it is governed by a Board of Trustees who are appointed by the Governor with the advice and consent of the Senate. Title 18, West Virginia, Chapter 11, section 1 (§ 18-11-1). It must report on its operations annually to both the Governor and the Legislature. (§ 18-11-1.) The Board holds title to all property of the University in Trust for the State and not as an independent corporate entity. *City of Morgantown v. Ducker* (1969) 153 W.Va. 121; [168 S.E.2d 298, 301]. It is a public and governmental body and as such is an arm of the state. *State ex. rel. Board of Governors v. Sims* (1960) 134 W.Va. 428, [59 S.E.2d 705].

Again, in the case of *City of Morgantown, Id.*, 302, 304; it was held by the Supreme Court of Appeals of West Virginia that West Virginia University is "an arm of the state", and performs a governmental function of the state.

Similarly, the California State University and Colleges, and San Jose State University are creatures of the legislature. *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942; [107 Cal.Rptr. 596]. California Education Code (Reorganized), Section 66600, *et seq.*. The Board of Trustees is composed of four ex officio members—the Governor, Lieutenant Governor and Superintendent of Public Instruction, and Chancellor, and in addition 16 members who are appointed by the Governor subject to confirmation by the Senate. The property administered by the Board belongs to the State, and any lease of property by the Trustees requires approval of the State Director of Finance. California Education Code section 89046.[1]

It has also been held that employees of the State University and Colleges system are state employees, subject to the civil service rules; and that the system, unlike the University of California, is subject to full legislative control and has only such autonomy as the legislature chooses to bestow. *Slivkoff v. Board of Trustees* (1977) 68 Cal.App.3d 394; [137 Cal.Rptr. 920].

Thus, as appears from the foregoing, both educational systems are instrumentalities of the state, and the real parties in interest in this case are the States of California and West Virginia. (As can be seen also by the cases cited

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1. Specific provisions of the Education Code create exceptions to the restrictions on the Trustees' powers to sell or lease property, but all require that any funds so obtained shall be reinvested in other specific kinds of real property. California Education Code sections 90406, 90420 and 90440.

above, the Attorney General of each State gives legal representation to the educational institutions on behalf of the respective states.)

This would not be the first contractual dispute between states to be granted an original hearing by this Honorable Court. See *Kentucky v. Indiana* (1930) 281 U.S. 163 [74 L.Ed. 785].

While it is true that this Court has declined to exercise its original jurisdiction in actions between states if it appears that the plaintiff is attempting to protect purely private interests rather than its own sovereign interests, *Pennsylvania v. New Jersey* (1976) 426 U.S. 660 [49 L.Ed.2d 124]; *Alabama v. Arizona* (1934) 291 U.S. 286 [78 L.Ed. 798]; such is not the case here. In the instant case, there are no private parties involved; and, hence the line of cases asserting the principle of *Pennsylvania v. New Jersey* (1976) 426 U.S. 660, would be inapplicable. Moreover, there is no basis for asserting jurisdiction in the federal district courts, and resort to a state court would be inappropriate since the controversy involves two states. In short, without access to this Honorable Court plaintiff would lack a tribunal to seek redress for the wrong it has suffered, and a state will have achieved a breach of contract against another state with total legal immunity. Unlike the situation, for example, in *Washington v. General Motors* (1971) 406 U.S. 109, 114 [31 L.Ed.2d 1043]; where the Court concluded that there was available to the parties the federal district court as an alternative forum, in this case there are none.

Also, the unavailability of a state forum was epitomized in the case of *Kentucky v. Indiana, Id.* at 165, where this court observed:

> "... It would be an anomaly if the contract entered into by the proper officers pursuant to legislative authority could be declared invalid by the courts of either

state. If such were the rule, the courts of one state might hold the contract to be valid and the courts of the other state might hold it to be invalid. Cf. *Arkansas v. Tennessee* 246 U.S. 158" 281 U.S. at 165.

CONCLUSION

The state educational institutions involved in this contract dispute are instrumentalities of their respective states, and an injury to San Jose State University pursuant to the contract is an injury to the State of California. Without recourse to this Court it is conceivable that educational institutions in the respective states could breach interstate contracts with impunity, contrary to our system of federalism. As this court held in the early days of our republic, a court possessed of jurisdiction generally must exercise it. *Cohens v. Virginia* (1821) 6 Wheat 264, 404.

It is respectfully requested that this Court grant California's motion for leave to file its original complaint herein.

DATED: July 17, 1981

Respectfully submitted,

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